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## Book Review: Natural Justice, by Paul Jackson; Development Control, by John Alder

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*Natural Justice*. By PAUL JACKSON. London: Sweet and Maxwell Ltd. 1979. Pp. 223. (\$19.35 paper, \$34.65 hardbound)

*Development Control*. By JOHN ALDER. London: Sweet and Maxwell Ltd. 1979. Pp. 194. (\$18.15 paper, \$33.00 hardbound)

Both of these books are published as part of the *Modern Legal Studies Series*, which is intended primarily for English law students. The aims of the series include providing students, within a comparatively short book, with new perspectives upon and a deeper understanding of topics that are less fully treated in standard texts. If met, these aims should also give to Canadian students and practitioners at a still reasonable price, a good introduction to interesting English legal developments in the areas covered. These books are both about administrative law; Professor Jackson takes the generalist's approach by emphasizing doctrine, while Mr. Alder starts from a particular aspect of the public control of land use, and places it within the wider context of the general principles of administrative law.

*Natural Justice* is a second, and much expanded, edition of Professor Jackson's book which was published in the *Modern Legal*

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<sup>10</sup> Le professeur Giroux n'hésite pas à stigmatiser certains arrêts égarés en les qualifiant de "jugements isolés".

<sup>11</sup> Au passage, par exemple, l'auteur dénonce les prises de décision en sacristie (p. 367).

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*Studies Series* in 1973. The author has confined himself, in the main, to a discussion of English authorities. As a work on procedural fairness before administrative tribunals, the book may thus have a rather limited interest in Canada, especially as Canadian law over the last few years has developed so rapidly, not least in respect of procedures before quasi-autonomous regulatory agencies. On these and other topics (such as procedures before rule-making), English law and Professor Jackson have little to tell us.

In addition, Professor Jackson has chosen to concentrate on detail<sup>1</sup> rather than to present an analysis of the reasons why particular procedural models are (or should be) used to make particular types of decision, or to argue about the proper roles of the courts and of other bodies in the development of procedures, or to speculate about future developments. Professor Jackson's ambitions are rather limited, and the fact that this book is intended for first degree law students is only a partial justification. English textbooks on administrative law already cover much of the area of this book, and there are surely more imaginative ways to stir the student than by serving up more of the same.

The author has not written a preface explaining the scope and objectives of his book; he may, thereby, have done himself a disservice, because in some ways the book is not only about the procedural obligations of fairness to which administrative bodies are subject. For instance, in Chapter 1 the author notes that the phrase "natural justice" has been used by judges in both a substantive and a procedural sense, and in contexts far removed from administrative law. Some reference to the roller-coaster career of "substantive due process" in the United States might usefully have been added to this interesting discussion. When Professor Jackson comes (in Chapter 7) to discuss four contexts in which natural justice (in its procedural sense) has been applied, he selects two (arbitration and the recognition and enforcement of foreign judgments) that would not normally be chosen in a book dealing with an aspect of English administrative law. Throughout the book the author draws freely upon curial procedure to illustrate his points. On the other hand, the book is not an exposition of the essential elements of civil and criminal procedures.

By and large, however, the material included in this book contains few surprises; nor are old friends shown in any new light. The author gives a clear and straightforward account of the law in a style that is well suited to this purpose, albeit that frequent resort to the particulars of cases and snippets from judgments militate against a broad development of ideas and lines of argument. There are some

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<sup>1</sup> See the 14 double-column pages of the table of cases for a short book!

points at which a student reader will need some further explanation. For instance, *Malloch v. Aberdeen Corporation*<sup>2</sup> is said to throw no doubt upon the common law rule that the rules of natural justice will not be implied into a "pure master and servant" case,<sup>3</sup> and yet we are also told that Lord Wilberforce stated that this was not so in cases of public employment. Further on,<sup>4</sup> the reader is told that that decision may apply where "something akin to a status" is involved. The alert reader may also be puzzled by the juxtaposition of the proposition<sup>5</sup> that "It is not contrary to natural justice . . . for a tribunal to receive hearsay evidence" and the author's listing<sup>6</sup> of judicial statements supporting the view that the right to cross-examine is an ingredient of natural justice. The tension between these propositions has recently been explored by the Divisional Court of the Queen's Bench Division in *R. v. Hull Prison Board of Visitors, ex. p. St. Germain (No. 2)*.<sup>7</sup> The author's statement<sup>8</sup> that "only in exceptional circumstances does natural justice require an oral hearing" is a little stark if intended to be a general truth. His handling of the relationship between the question of *locus standi* to be heard before the agency and *locus standi* to challenge agency decisions in a court<sup>9</sup> is apt to obscure rather than to enlighten.

A comment should also be made about Professor Jackson's decision to delay until half way through his book the beginning of his discussion of the circumstances in which the rules of natural justice will and will not apply.<sup>10</sup> Meanwhile, the reader will have been told what the contents of both limbs of the rules of natural justice are. It can be conceded that there are indeed difficulties for the beginner in trying to understand when a person has a right to a hearing without having much notion of what a "hearing" is. But this can readily be cured by a brief statement of the essentials of a trial-type hearing and the assertion that not all hearings considered in the cases may be so elaborate. To start by explaining when a hearing is due raises the basic issues of why a hearing is or should be given; questions about the contents of particular kinds of hearings and their appropriateness can then be considered within a clearer analytical framework. On the other hand, the author's decision to include a chapter entitled

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<sup>2</sup> [1971] 1 W.L.R. 1578.

<sup>3</sup> P. 107.

<sup>4</sup> P. 138.

<sup>5</sup> P. 73.

<sup>6</sup> Pp. 73-74.

<sup>7</sup> [1979] 3 All E.R. 545.

<sup>8</sup> P. 165.

<sup>9</sup> P. 108-109, 200-201.

<sup>10</sup> Chs 5 and 6 respectively.

"Justice Must be Seen to be Done" was a good one, for it enabled him to collect a number of situations in which judges have recognized that both of the rules of natural justice, and some rules that do not normally come within this rubric, serve the important purpose of maintaining public confidence in the integrity of the institutions of government. The book is well produced; typographical errors are few, although the name of the plaintiff in *Stininato v. Auckland Boxing Association*<sup>11</sup> is consistently misspelled, and the spelling of the applicant's name in *R. v. Kent Police Authority, ex p. Godden*<sup>12</sup> and of Willis J.<sup>13</sup> has gone awry.

For the reasons outlined above, this book cannot be described to a Canadian readership as being any more than useful. G. A. Flick's *Natural Justice*,<sup>14</sup> an eclectic selection of problems and jurisdictions is more likely to provide new insights, ideas and authorities.

Land use planning programmes vary from country to country in their overall design, philosophy and administration, as well, of course, as in their detail. Nonetheless, those interested in planning law in Canada will find that in *Development Control*, Mr. Alder has provided a lucid account of the general scheme of English town and country planning, and a particularly helpful explanation of that part of planning with which lawyers are especially concerned, the direct effect of land use controls upon the individual. Of course, it is no more possible to discuss planning law than tax law without an analysis of a fair amount of statutory detail. But by judicious selection and dexterous weaving of detail and principle Mr. Alder has succeeded in producing a readable, informative and interesting book for those without prior familiarity with English planning law.

This book is primarily concerned with the "lawyer's law" of planning, drawing heavily upon those parts of the law that are contained in statutes and decisions of the courts, although reference is made, from time to time, to the "jurisprudence" of the Secretary of State for the Environment, who exercises a crucial central administrative appellate jurisdiction over refusals by local planning authorities to grant unconditional permission. Nor does the author overlook the importance of departmental circulars in planning decisions. In view of the rather narrow focus of the rest of the book, the author was undoubtedly right to start with a lengthy introductory chapter (which occupies more than a fifth of the book's total number of pages), in which a number of more general issues are discussed.

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<sup>11</sup> [1978] 1 N.Z.R.1.

<sup>12</sup> [1971] 2 Q.B. 662, cited p. 106.

<sup>13</sup> P. 165.

<sup>14</sup> (1979).

These include definitions of the subject-matter of planning, which range from directing a country's social and economic development, to protecting individuals' sensitivities about the use to which neighbours put their land. Much the same law and decision-making processes apply in England to the siting of a nuclear power station as to changing the use of a building from a house to an office. Of special interest to readers with little prior knowledge of the English planning system will be Mr. Alder's brief account of the principal features of planning legislation since 1947 (particularly the differing attitudes taken by governments to the public "capture" of increases in land value that are attributable to permission to develop), the role of the development plan and the spheres of responsibility of local and central government for developing and applying planning policies.

The author then explains the types of activity that trigger the statutory control mechanisms; the section in which he describes what may amount to "a material change in the use of land" is particularly helpful. The reader is guided through the somewhat tortuous case law by the bright light of the purposes of planning law. Succeeding chapters deal with applications for planning permission and with the discretion exercisable by the planning authorities over the disposition of applications. Of the latter, Mr. Alder concludes that the courts have, in the main, taken a broad view of the considerations that may legally be brought to bear by local planning authorities and by the Minister. Apart from some dubious decisions in which the courts may have employed too zealously the standard of unreasonableness, they have not been astute to discern questions of law in the exercise of discretion on matters of substance. We are not, however, surprised to learn that matters of procedure have excited a much closer judicial attention. One might have liked to see a little more discussion of the appropriate roles of rule and discretion in planning.

Chapter 6 contains a short account of planning agreements, to which planning authorities have turned in recent years in an attempt to avoid some of the rigidities of the normal planning powers and procedures. Most of the discussion is taken up with an examination of the technical limitations of the statutory powers under which planning agreements are made, and although the broader issues are adverted to in the first few pages of the chapter, this is a point at which the author might have tipped the balance towards wider implications, at the expense, if necessary, of technical detail.

The last two chapters explain enforcement procedures and planning appeals (both to the Minister and to the courts). Appeals are conducted by means of a local public inquiry held by an official of the Ministry, who, when he does not have final decision-making power, reports to the Secretary of State. The author outlines clearly, if briefly, the principal features of the inquiry—a widely used device

in British public administrative practice—and its procedural attributes and problems.

Despite the very considerable differences between the institutional arrangements within which land use planning is conducted in Canada, readers will encounter a number of very familiar problems. Are public authorities whose officials give erroneous advice upon which developers rely to their detriment estopped from asserting *ultra vires*? Despite some recent forays by Lord Denning, the answer seems to be, generally, no. The rights of third parties to appear at administrative hearings and their *locus standi* to challenge decisions in the courts are also familiar issues in the Canadian context. Incidentally, Mr. Alder's suggestion<sup>15</sup> that the status amenity groups should be given formal recognition at inquiries is evocative of Le Dain J.'s recent judgment in the *Canadian Broadcasting League* case.<sup>16</sup> Similarly, the author's discussion of the legal issues surrounding the implementation of policy (fettering, disclosure and cross-examination), will remind readers of the solutions recently attempted by our courts.

A general feature of Mr. Alder's book is the success with which he has located the courts' role in the law relating to the control of the development of land, within the wider framework of the grounds upon which courts intervene in the administrative process. The book will be of interest both to the generalist administrative lawyer and to the specialist planning lawyer.

Turning to matters more particular, some of Mr. Alder's statements should not pass without comment. For example, the author may too flatly state<sup>17</sup> that a neighbour has no *locus standi* to enjoin an unauthorized development. It may well be arguable that such a person is adversely affected by the illegality to an extent over and beyond the public at large. The House of Lords in *Gouriet*<sup>18</sup> probably did not confine standing for injunctive relief to those whose legal rights (in a narrow sense) are at stake. Indeed, the Court of Appeal has subsequently held, in another context, that notwithstanding the absence of a legal right capable of being vindicated by an action for damages, special loss or injury to an interest that is within the protection of the legislation concerned, can suffice for an injunction.<sup>19</sup> Nor is it so clear that a neighbour could not obtain *mandamus* to require a corrupt or sleepy local authority lawfully to consider whether to take enforcement proceedings against an

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<sup>15</sup> P. 178.

<sup>16</sup> (1979), 101 D.L.R. (3d) 669.

<sup>17</sup> P. 4.

<sup>18</sup> [1978] A.C. 435.

<sup>19</sup> *Ex parte Island Records Ltd.*, [1978] Ch. 122.

infringer of the planning laws. The author's discussion of standing<sup>20</sup> fails to mention the series of cases to which Mr. Blackburn has been party, where the *locus standi* of a local resident to challenge a local authority was not explained by the unhelpful analogy between a *cestui que trust* and trustee.

Mr. Alder's attempt<sup>21</sup> to reconcile the conflicting judicial decisions on the relevance of estoppel in public law is not totally convincing. If, as he alleges, *Wells*<sup>22</sup> and *Lever Finance*<sup>23</sup> can be explained as cases in which the failure by the local authority to comply with the formal statutory requirements before decision-making power could be delegated did not render the subsequent decision *ultra vires*, why was estoppel relevant at all? The truth of the matter is that there is a fundamental, and as yet unresolved conflict, between Lord Denning (and some other members of the Court of Appeal) and the views expressed in *obiter dicta* by certain members of the House of Lords in the *Falmouth Boat Construction* case.<sup>24</sup> Incidentally, the question posed<sup>25</sup> about whether a person who has applied for planning permission is estopped from denying that he ever needed it has been clearly answered in the negative by the House of Lords in the *Newbury* case.<sup>26</sup> One might also doubt whether Mr. Alder succeeds<sup>27</sup> of disposing of the argument that the judicialisation of the procedure on planning appeals causes delay, simply by his assertion that if "useful", procedure does not, by definition, cause "delay". The issue of "utility" is, of course, more complex than this aphorism would suggest. Finally, the discussion<sup>28</sup> about "void" decisions and appeals might have been helped by reference to the pragmatic approach to aspects of this problem in *Calvin v. Carr*.<sup>29</sup>

Again, the general standard of production of this book is good; misprints are few although the name of the author of *The Politics of the Judiciary* erroneously appears in the plural,<sup>30</sup> and the name of the applicant in *Ostreicher v. Secretary of State for the Environment*<sup>31</sup> is

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<sup>20</sup> P. 32.

<sup>21</sup> Pp. 38-40.

<sup>22</sup> [1967] 1 W.L.R. 1000.

<sup>23</sup> [1971] 1 Q.B. 222.

<sup>24</sup> [1951] A.C. 837.

<sup>25</sup> P. 71, n. 1.

<sup>26</sup> [1980] 1 All E.R. 731.

<sup>27</sup> P. 166.

<sup>28</sup> Pp. 149 *et seq.*

<sup>29</sup> [1979] 2 W.L.R. 755.

<sup>30</sup> P. 110.

<sup>31</sup> [1978] 1 W.L.R. 810, cited p. 185.



spelled incorrectly, if phonetically. Lines at the top of pages 119 and 120 seem to have been omitted or transposed, or both.

In short, both of these books are worthwhile additions to the growing English literature on administrative law. Despite its more specialist focus, Mr. Alder's book is the more likely of the two to be of real interest to Canadian public lawyers.

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